

1987

Richard S. Smith v. Rocky Mountain Helicopters : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 870511-CA

UTAH COURT OF APPEALS

STATE OF UTAH

RICHARD S. SMITH,

:

Plaintiff and Appellant,

:

-vs-

:

ROCKY MOUNTAIN HELICOPTERS,
INC., a Utah corporation, and
EXECUTIVE ESCROW SERVICES,
a Utah corporation,

:

Case No. ~~870265~~ *870511-CA*

:

Priority No. 14b

:

Defendants and Respondents.

:

BRIEF OF APPELLANT

Appeal from the Fourth Judicial District Court
Of Utah County
Honorable Boyd L. Park, District Judge

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Date 1/16/16

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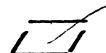
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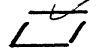
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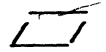
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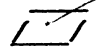
Argument



Conclusion



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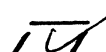


Length

Appellant/Respondent--50 pages, not including addendum.

Reply--25 pages, not including addendum.

Petition for Rehearing--15 pages, not including addendum.



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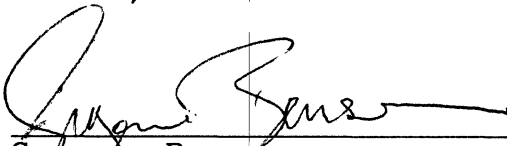
UTAH COURT OF APPEALS

STATE OF UTAH

RICHARD S. SMITH, :
Plaintiff and Appellant, : STATEMENT OF JURISDICTION
-vs- :
ROCKY MOUNTAIN HELICOPTERS, : Case No. 870265
INC., a Utah corporation, and :
EXECUTIVE ESCROW SERVICES, : Priority No. 14b
a Utah corporation, :
Defendants and Respondents. :
:

Pursuant to the letter dated November 6, 1987, and received in this office November 12, 1987, (see attached) and R. Utah S. Ct. Title II, Rule 4A (a), jurisdiction is hereby vested in the Utah Court of Appeals.

DATED this 17th day of November, 1987.



Suzanne Benson
McDonald & Bullen
Attorney for Plaintiff

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

November 6, 1987

OFFICE OF THE CLERK

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Richard S. Smith,
Plaintiff, Appellant,
and Cross-Respondent.

v.

No. 870265

Rocky Mountain Helicopters,
Inc., a Utah corporation, and
Executive Escrow Services, a
Utah corporation,
Defendants, Respondents,
and Cross-Appellant.

Pursuant to the the authority vested in this Court, this case is poured-over to the Court of Appeals for disposition. All further pleadings and correspondence should be directed to that Court. Their address is 230 South 500 East, Suite 400, Salt Lake City, Utah 84102.

Geoffrey J. Butler, Clerk

UTAH COURT OF APPEALS

STATE OF UTAH

RICHARD S. SMITH, :
Plaintiff and Appellant, :
-vs- :
ROCKY MOUNTAIN HELICOPTERS, : Case No. 870265
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UTAH COURT OF APPEALS

STATE OF UTAH

RICHARD S. SMITH, :

Plaintiff and Appellant, :

-vs- :

ROCKY MOUNTAIN HELICOPTERS, : Case No. 870265

INC., a Utah corporation, and : Priority No. 14b

EXECUTIVE ESCROW SERVICES, :

a Utah corporation, :

Defendants and Respondents. :

:

BRIEF OF APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

May an employer wrongfully terminate an employment contract and then hold the employee responsible for not completing performance under the contract?

DETERMINATIVE AUTHORITIES

There are no authorities which appellant believes to be directly dispositive of any of the issues in this case.

STATEMENT OF THE CASE

Nature of the Case

This is an action to determine the rights of the parties with respect to 11,445 shares of stock in Rocky Mountain Helicopters pursuant to the terms of a contract that was wrongfully terminated by respondent.

Course of Proceedings Below

The case was tried on March 11, 1987, before The Honorable Boyd L. Park, Fourth Judicial District Court in and for Utah County, State of Utah. (R. 290)

On May 12, 1987, the district court in a memorandum decision held that a consulting agreement between plaintiff and defendant was wrongfully terminated by defendant. The district court also held that despite the wrongful termination by defendant, plaintiff must nonetheless return 11,445 shares of Company stock to defendant. (R. 300) This stock constituted a material portion of the consideration which plaintiff was to receive pursuant to the agreement.

The order incorporating the lower court's decision was entered on June 23, 1987. (R. 303-4) Plaintiff filed his Notice of Appeal on July 23, 1987. (R. 305-A)

STATEMENT OF FACTS

In January, 1981, Plaintiff-Appellant, Richard Smith (hereinafter "Smith") entered into an employment contract with Defendant-Respondent Rocky Mountain Helicopters (hereinafter "Rocky Mountain"). The primary negotiator for Rocky Mountain was its acting President, Jim Burr (hereinafter "Burr"). (Tr. 17)

The initial contract was in all practical aspects an employment contract whereby Smith was to act as Vice President of Finance in exchange for a salary and incentive bonus.

One of the primary duties of Smith under the employment contract was to locate a buyer and negotiate a sale of all of the stock and/or assets of Rocky Mountain to a third party. (R. 291) However, as Smith attempted to perform his obligations, he was repeatedly hampered by the actions of Burr and other Rocky Mountain officers. First, Rocky Mountain secretly issued 58,000 shares of Rocky Mountain stock to Burr and his brother thereby diluting the interest of all other shareholders, including Smith. By reason of Smith's objections, the new issue of stock to Burr was cancelled. (Tr. 43-44) However, the transaction was distracting and hampered Smith's efforts to perform his obligations. Second, when Smith successfully performed his primary duties and obtained a Letter of Intent from a buyer (the buyer was called Offshore Logistics Company) committing to the purchase of all of the stock of Rocky Mountain (Tr. P-9), Burr suddenly changed his mind and refused to pursue the stock sale. (Tr. 46-50) Finally, despite Smith's attempts to perform

his obligations, Burr attempted to unilaterally amend the employment agreement by limiting Smith's authority and thereby impairing his ability to perform. (Ex. P-11)

Rocky Mountain's repeated interference with Smith's performance caused a significant dispute to arise between the parties. (R. 294) However, the parties succeeded in compromising their differences by preparing new agreements which were designated as a "consulting agreement" and an "escrow agreement". (Tr. 109) The escrow agreement specifically stated that all prior agreements were superceded and that the new agreements constituted the sole agreements between the parties. (Exs. P-13 & P-14) It is the consultation agreement and escrow agreement that are the subject matter of this litigation.

Before summarizing the terms of the consulting and escrow agreements, it should be noted that pursuant to the prior employment agreements, Smith was issued 11,445 shares of Rocky Mountain stock as partial consideration for services under the prior agreements. (Ex. P-7)

Under the new Consulting Agreement, Smith was to be employed by Rocky Mountain for the period of one year. His principal assignment was to sell the company or raise equity funding. Smith, in turn, agreed to place his 11,445 shares of Rocky Mountain stock, (Cert. #103) in escrow. This agreement was memorialized in a writing dated February 15, 1984, which consisted of a Consulting Agreement prepared by Smith and Burr and an Escrow Agreement prepared by Rocky Mountain's attorney,

Jerry Thorn. The actual signing of the Escrow Agreement was February 27, 1984. (Ex.s P-13 & P-14)

Under the Consulting Agreement, Smith's principal assignment involved activities towards the goal of either selling Rocky Mountain or adding additional equity to the company. He would also act as an agent of Rocky Mountain in his efforts to raise equity capital and function as a financial or corporate planning advisor to Burr and Rocky Mountain in whatever areas they might see fit.

The consulting agreement provided that for his consulting services, Smith would receive consideration in the amount of \$275.00 per day or \$137.50 per half day for the time that Smith spent rendering consulting services for the Company. Smith was also to receive the benefit of having his medical and dental insurance paid for by the Company and continued life insurance and associated health insurance.

Under the consulting agreement, Smith received his income taxes prepared for the 1983 tax year, \$1,000.00 worth of spousal travel upon approval, use of the Xerox machines and use of the Watts lines for personal use only. Smith was given an Oldsmobile automobile and four new tires for the car in exchange for accrued vacation, sick time and separation benefits. Smith was to receive 50 gallons of gasoline per month and an agreement was provided for the exchange of Smith's receivables from the Windgate Oil for a Suburban automobile. (Ex. P-13)

The Escrow Agreement, which is dated February 17, 1984, pro-

vided that the was to be understood by Rocky Mountain and Smith, that this Escrow Agreement superceded all prior agreements and was the sole agreement between the parties governing the disposition of stock. (Ex. P-14)

The Agreement also provided as follows:

If, at any time during the one-year from the date of this agreement, ROCKY MOUNTAIN HELICOPTERS, INC., is sold to a third party, or parties, either by virtue of a majority of its assets being purchased, or, in the alternative, any public or private sale of its stock or the stock of any subsidiary takes place, then in that event, the shares of stock represented by the certificates deposited herewith will be returned to Richard S. Smith; provided that if any negotiation for the sale of assets or stock have begun prior to the expiration of one year from the date hereof, that result in such a sale, then and in that event, such sale will be considered to have occurred within the one year previously mentioned herein.

Provided further that in the event the conditions described herein do not occur within one year from the date of this agreement, then stock represented by Certificate #_____ will be returned to ROCKY MOUNTAIN HELICOPTER, INC.

During the latter portion of 1983, there was a crash of one of Rocky Mountain's insured helicopters. Pursuant to an existing agreement between the shareholders, the insurance proceeds were required to be distributed to some of the shareholders in accordance with their proportionate shares. This disbursement was accomplished in early 1984. (Tr. 152) Later, the company requested that the shareholders return their proportionate share of the insurance proceeds. Burr became upset with Smith when

Smith refused to return the money. (Tr. 149)

As a result of this argument concerning the ownership of the insurance proceeds from the helicopter crash, Rocky Mountain sued Smith on April 16, 1984. Three days later, on or about April 19, 1984, the suit was settled. Based on this law suit, and other factors, the relationship between Rocky Mountain and Smith was strained. (R. 298)

On March 4, 1984, Smith officially resigned as a Director of Rocky Mountain Helicopters. In his formal letter, Smith stated: "this no way affects my availability and willingness to continue to serve under the Consulting Agreement in areas that are deemed appropriate, and particularly with respect to efforts to sell the Company or equity therein". (Ex. D-27)

On April 23, 1984, Smith's Consulting Agreement with Rocky Mountain Helicopters was terminated by Burr as president of Rocky Mountain. (Ex. P-20) The lower court specifically found that this termination by Rocky Mountain was wrongful (R. 299-300)

This case was submitted to the Honorable Judge Boyd L. Park. The lower court held that there was a valid employment contract between plaintiff and defendant. (R. 299) The lower court further held that Rocky Mountain had breached the contract by wrongfully terminating Smith, and, as such, Smith was entitled to Judgment against the defendant Rocky Mountain as follows:

- a) \$600.00 for gasoline benefit
- b. \$2,699.55 for medical and insurance expenses the plaintiff incurred during the term of the Consulting Agreement.

Notwithstanding this holding, the Court held that Rocky Mountain was entitled to the return of the 11,445 shares of Company stock inasmuch as the Consulting Agreement and Escrow Agreement provided for the return of stock in the event the Company was not sold or a public or private sale of equity was not effected. (R. 299-300)

SUMMARY OF ARGUMENT

This appeal requests this Court to examine the internal consistency of the lower court's decision in this case. The lower court held that the consulting contract was wrongfully terminated by Rocky Mountain and, at the same time, held that Smith was responsible for not completing performance under the contract and thereby obligated to return to Rocky Mountain the 11,445 shares of stock held pursuant to the escrow agreement. This decision should be overruled and the shares of stock returned to Smith.

The party prevented from performing may be treated as though he had performed. In the present case, Smith was prevented from performing his contractual obligations by reason of Rocky Mountain's wrongful termination. Therefore, Rocky Mountain should not benefit from its breach of the employment contract and the 11,445 shares of stock should be returned to Smith.

A. All parties to a contract are obliged to proceed in good faith and cooperate in the performance of the contract. One party to a contract cannot, by willful act or omission, make it difficult or impossible for the other

party to perform.

B. When an employer and an employee have entered into an employment contract for a definite period of time, the employer may terminate or discharge an employee only upon a showing of good cause for said termination. The lower court specifically determined that Rocky Mountain's termination of the consulting agreement was wrongful.

ARGUMENT

POINT I

WHERE A PARTY CAUSES A BREACH OR NON-PERFORMANCE OF
A CONTRACT, HE CANNOT RECOVER DAMAGES FOR NON-PERFORMANCE.
THE PARTY PREVENTED FROM PERFORMING MAY BE TREATED AS THOUGH
HE HAD PERFORMED

There can be no breach of a contract on the part of one whose performance is prevented or rendered impossible by the conduct of the other party. The party who is prevented from performing may be treated or considered as though he had performed. 17A C.J.S. Sec. 468; See Gibbs v. Whelan, 239 P.2d 727 (N.M. 1952) Weaver v. Williams, 317 P.2d 1108 (Ore. 1957); Bewick v. Mechan, 156 P.2d 757 (Cal. 1945); Pacific Venture Corp. v. Huey, 104 P.2d 641 (Cal. 1940); Overton v. Vita-Food Corp. 210 P.2d 757 (Cal. 1949)

In Gibbs, the New Mexico Supreme Court found that the parties entered into an agreement wherein defendant hired plaintiff to perform certain work. Defendant subsequently failed to line up the work for plaintiff and there were intervals when

the plaintiff could not perform any work, but was still ready, able and willing to perform. The New Mexico Court held that the defendant having voluntarily failed to line up work for plaintiff thus preventing him from fulfilling his agreement, would not be permitted to deny liability.

Smith's situation is very similar to that of the plaintiff in Gibbs. During late 1983, and after the consulting agreement was signed, Smith was ready, willing and able to work for Rocky Mountain. Smith testified that he contacted Rocky Mountain and made himself ~~ava~~ailable for the consulting work, and kept Rocky Mountain informed of his activities. However, Rocky Mountain prevented him from meeting with investors from New York, who were working on the equity sale of the company. The testimony establishing these facts is quoted in the Addendum attached to this brief.

Rocky Mountain prevented Smith from carrying out his duties under the consulting agreement, even during the time prior to his wrongful termination. Because of this prevention, Smith should be treated as if he performed his part of the agreement and the escrowed stock should be returned to Smith.

Any conditions which the facts show might have been performed by him, it will be assumed would have been performed if the conduct of the promisor was such as to preclude the possibility of performance. 5 Williston on Contracts Sec. 677A at 233.

The facts in this case show that Smith had accomplished

virtually all assignments that he was given by Rocky Mountain. (R. 291) At the time immediately prior to his termination, Smith continued his negotiations with Offshore Logistics, with regard to the sale of Rocky Mountain (Tr. 217). Thus, it should be assumed that Smith's duties under the contract would have been performed, if Smith had not been wrongfully terminated by Rocky Mountain.

Rocky Mountain should not, as a matter of law, be able to invoke Smith's nonperformance as a defense to Rocky Mountain returning the stock. See Fisher v. Johnson, 525 P.2d 45 Utah 1974); Cummings v. Neilson, 42 Utah 157, 129 P.619 (1912).

A. All parties who enter into a contract have an obligation to cooperate and perform in good faith.

The lower court held that Smith and Rocky Mountain had entered into a valid contract. (R. 306) Once a contract has been created, the duty of good faith will be implied.

Section 205, Restatement (2d), Contracts (1981) provides as follows:

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

Comment (a) states in part:

"Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness."

This duty to proceed in good faith and to cooperate in the

performance of the contract has been accepted by this Court. See Cahoon v. Cahoon, 641 P.2d 140 (Utah 1982); Weber Meadow-View Corp. v. Wilde, 575 P.2d 1053 (Utah 1978).

In the instant case, Smith fulfilled his duty to perform in good faith and cooperate. Smith was quite successful in his employment in the principal areas which he had been assigned. (R.291) In addition to restructuring Rocky Mountain's financial position, restructuring Rocky Mountain's arrangement with their preferred shareholders, and refinancing the Teacher's Insurance Fund, Smith began doing consultation work with the Bill Finley group on the behalf of Rocky Mountain. (Tr. 180) Burr, the president of Rocky Mountain, told Smith that perhaps a consulting agreement with the Bill Finley group would be a good idea. (Tr. 180-81) Smith continued this consultation work with Finley throughout 1983-4.

Throughout the Fall and Winter of 1983, Smith continued to cooperate and perform his duties under the contract in good faith. In October of 1983, a letter of intent for the sale of Rocky Mountain to Offshore Logistics was negotiated, and ratified by the Board of Directors at a meeting on November 15, 1983. (R. 295)

However, towards the latter part of 1983, as a result of differences regarding corporate policy, a rift arose between Burr and Smith. (R. 295) At this point in time, Burr and Rocky Mountain began to breach their duty of good faith and cooperation. On April 23, 1984, Rocky Mountain made the final

breach by wrongfully terminating Smith's consulting agreement.
(R. 300)

B. Wrongful termination by an employer constitutes a breach of the employment contract and excuses, further performance by the employee.

The lower court found from the facts of this case, that there were several instances that conflicts arose between Smith and Burr. The problems began toward the latter part of 1983, when as a result of differences regarding corporate policy, a rift arose between Burr and Smith. (R. 294) At this time, a Rocky Mountain helicopter crashed. As a result of this accident, insurance proceeds were disbursed to Smith and others employed by Rocky Mountain. These disbursements took place in early 1984. (Tr. 152) Smith refused to return his portion of the proceeds and Rocky Mountain filed a law suit against Smith on April 16, 1984. The law suit was settled on or about April 19, 1984. Because of this suit and other factors, the relationship between Burr and Smith was left strained. (R. 298). In fact, Burr was quite angry with the settlement of the law suit. (Tr. 68) Three days after the settlement of the suit, Burr, acting as President of Rocky Mountain, terminated Smith. At the time of termination, only two months of the twelve month period allowed for Smith to find a buyer for the company had expired.

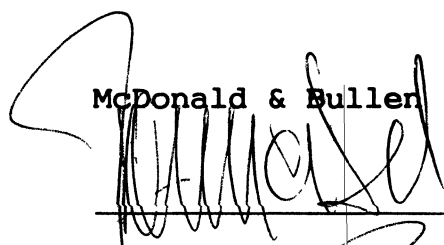
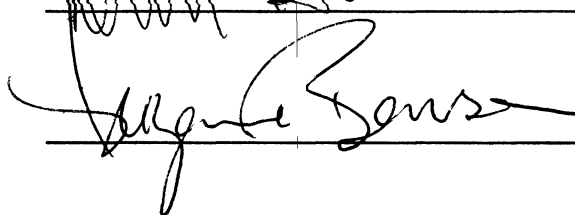
The lower court held that said termination was wrongful.
(R. 299) And at the same time, the lower court found that, despite termination of the contract, Smith was not completely

frustrated and prevented from finding a buyer for the Company within the one year time period stated in the contract. These two findings are in direct conflict with each other. If an employer discharges an employee, the employer must meet the burden of justifying such discharge. See Chiodo v. General Waterworks Corporation, 17 Utah 2d 425, 413 P.2d 891 (1966) In the present case, the Court found that that burden was not met and that Smith had been wrongfully discharged (R. 299). The lower court then held that Smith had been wrongfully discharged only in relation to certain items. This decision was erroneous as a matter of law. Once a party has been wrongfully discharged, there is a breach of the employment contract and the good faith standard. See Mitford v. de La sala, 666 P.2d 1000 (Alaska 1983). This good faith standard was breached by Rocky Mountain and they should not be entitled to benefit from the breach. The lower court by allowing Rocky Mountain the return of the stock allowed the breaching party to benefit. As a matter of law, this decision should be overruled.

CONCLUSION

Based on the foregoing, plaintiff requests that this case be reversed and judgement be entered entitling the return of the 11,445 shares of Rocky Mountain Helicopter stock to the plaintiff.

DATED this 15th of November, 1987.

McDonald & Bullen



ADDENDUM

Q. You have also heard some testimony with regard to availability, did you ever try and contact Rocky Mountain Helicopters to make yourself available?

A. Yes, I offered to as I think I testified before. I offered to meet with the consultants who were coming in from New York. I was just not allowed to.

Q. Do you remember were there any messages left at your home that Mr. Burr was trying to get a hold of you?

A. Yes.

Q. And do you recall - -

A. And those messages had to do with the helicopter situation. There was never a single message either at my home where my wife stays a hundred per cent of the time or at the office in California where I was doing the consulting work where there was someone there at the phone all of the time. There was never a single contact to me to ask for assistance in the consulting.

Q. How many contacts were there with regard to this helicopter problem?

A. Half a dozen.

Q. And this would all be during the first, two, three four weeks of the consulting Agreement?

A. Yes it was, yes four or five weeks.

Q. Finally would you explain what you were doing with the Asher Finley Company what your assignment was and when you went there and at who's request, etc.

A. Bill Finley had been the general partner on our blade development program and also in an oil and gas program which I helped Jim put together. Windgate Oil and he was invited to sit on our board. He subsequently invited me to sit on their board. He was a very capable man. Had been a senior partner in Arthur Young & Company but was an alcoholic. And they needed some help from time to time when he was out of commission.

Q. Can I see the last exhibit that I have? Thank you.

I will show you has been marked as Exhibit No. 28 would you identify that and tell me what it is?

A. Yes this is the November letter to Jim Burr that I wrote to just kind of updating him on my status with Bill Finley and indicating that there were some problems that I would be spending some time on.

Q. Did you also make verbal reports to him as to what you were doing with that company?

A. From time to time particularly as they had impact on the Windgate Oil matter and the helicopter blade program.

Q. Now the last paragraph of this said that I would suggest that we proceed to determine exactly what kind of time requirements this commitment would impose on me but appears that such time requirements might become a problem, I would like to discuss that with you at that time, did he ever respond to that request?

A. Not really.

Q. But he was kept informed of your activities?

A. Yes.

Q. And this was in November of 1983 four months before the Consulting Agreement?

A. That is correct.

Q. That is all?

A. Just going to say during that time I Mr. Finley was up and about and capable I went down for a few board meetings but was not a large amount of time.

THE COURT: Anything further?

MR. YOUNG: Just one questions.

CROSS EXAMINATION

BY MR. YOUNG

Q. You indicated that you were not allowed to meet with the consultants from New York and you tell me what it was that prevented you from doing that?

A. Jim Burr had as part of the Consulting Agreement indicated that he was bringing in some New York people to work on an equity sale of the company either a stock issue or something I am not sure what they had in mind as an initial assignment in my Consulting Agreement he

had wanted me to meet with them. They were meeting with Lew Tippetts and I asked Lew Tippetts on several occasions should I become involved can I meet with them and was essentially told, well let's wait now is not the right time and there never was a right time. I was not allowed to even be introduced to those people. One time when I was there and it would have been very practical for them to get to meet me.

Q. And that what prevented you from meeting with them?

A. Well I could have gone in to the office and said that here I am and I am so and so but I did honor the office protocol of honoring Lewis' office and he and Jim meeting with these people. (Tr. 219-222)

